#260

IN THE MATTER OF the Ontario Human Rights Code, R.S.O. 1981, c. 53, as amended

AND IN THE MATTER OF the complaint made by Catherine Prestanski, of Windsor, Ontario, alleging discrimination in employment by Windsor Western Hospital Centre, Inc., its servants and agents and Mrs. Marilyn Stoddart and Mrs. Jackie McLean, 1453 Prince Road, Windsor, Ontario

AND IN THE MATTER OF a Board of Inquiry appointed to hear and decide the Complaint.

BOARD OF INQUIRY: M. R. Gorsky

APPEARANCES: Leslie McIntosh
Counsel for the Commission

Leonard P. Kavanaugh, Q.C.
Counsel for Windsor Western Hospital

Hearings in the above matter were held in Windsor, Ontario on October 17, 19, 1984; January 8, 9; May 27, 28, 29; and August 19, 1985.

DECISION

The complaint involves an allegation of discrimination in employment on the basis of sex contrary to sections 4(1)(a)(b)(c)(e) and (g)of the Ontario Human Rights Code, R.S.O. 1970 c.318, as amended. The Complainant, Catherine Prestanski, names three parties; the corporate respondent, Windsor Western Hospital Centre Inc., Ms. Marilyn Stoddart, at all material times Placement Officer at the Hospital, and Mrs. Jackie McLean, who in 1979 was a Supervisor in the Housekeeping Department and in 1980 was appointed Director of Housekeeping.

Windsor Western Hospital (I.O.D.E. unit) is a health care facility in the city of Windsor, Ontario employing approximately 1,000 full-time and part-time employees [Evidence, Vol.IV, p.2]. According to Mr. A. J. Lopes, Director of Personnel Services, the percentage of female employees in the Hospital is 90-95% and 90% of the total work force is unionized [Evidence Vol. IV, p.2]. Within the Housekeeping Department a number of job classifications exist, specifically those of Porter/Janitor and Housekeeping and Dietary Maids. Until the time of the events which are the subject of this complaint it is clear that (except for one instance which will be discussed later) Porter/Janitors were male and Maids were female. Since the initiation of this complaint the Maid classification has been restyled "Helper" and the evidence indicates that a small number of females have applied for and been hired as Porter/Janitors.

No evidence was led as to the number of males in the "Helper" position.

The Complainant, Catherine Prestanski, was employed in the Housekeeping Department of the Hospital during the summers of 1979 and 1980. Ms. Prestanski was employed as a casual or vacation-relief staff and as such was not a member of any bargaining unit. As a casual staff, Ms. Prestanski worked full-time hours but had no guarantees that her employment would continue past the period during which vacation-relief was needed. In fact she was terminated on September 15, 1980 and has not been employed at the Hospital since that time.

The situation giving rise to this complaint occurred on or about the first of September, 1980. On August 27, 1980, three openings for full-time employment in the Housekeeping Department were posted as per the collective agreement. One position was for a Maid and the two others were for Porters. Ms. Prestanski applied for one of the Porters' positions. According to the evidence of Marilyn Stoddart [Evidence, Vol. VI, p.27], three applications for the Porters' positions were considered; that is, Catherine Prestanski, Randy Pageau, and Mark Fryer. All three were employed at that time at the Hospital as casual staff. The permanent positions were awarded to the two male applicants, Randy Pageau and Mark Fryer, on or about September 4, 1980. On September 15, 1980, the employment of Ms. Prestanski was terminated as vacation relief and on October 3 she went to the Human Rights Commission alleging that the hiring decision

discriminated against her on the basis of sex.

The hearing of this complaint has occupied eight days including two days of legal argument with six witnesses and thirty-three Exhibits. The evidence was complex, contradictory and often confusing. Both counsel were exhaustive in their examination of every conceivably relevant issue. In the interests of fairness it was the Board's position throughout that evidence be heard rather than excluded. The generous amplitude given counsel is attested to by the approximately 1300 pages of transcript. Sifting the wheat from the chaff in this voluminous record has been a time-consuming and often painful process.

Before going into more detail on the facts of the complaint it is necessary to briefly consider a preliminary issue which arose on the first day of the hearings. The complaint, arising as it did in 1980, specifies violations of the Human Rights Code R.S.O. 1970, c.318, as amended ("the Old Code"). In 1981, the Human Rights Code was amended and in June of 1982 the amended version was proclaimed in force, R.S.O. 1981 c.53 (the New Code). Ms. Prestanski's original complaint was investigated by the Commission and on April 18, 1983 she was advised that the Commission had decided not to request the Minister to appoint a Board of Inquiry. Pursuant to Section 36 of the New Code Ms. Prestanski applied for a reconsideration of her complaint and in December of 1983 the Commission revised its earlier decision thereby resulting in the appointment of this Board under the New Code. The Old Code provided no such right of reconsideration.

The respondent argues that the case is therefore bifurcated between two pieces of legislation with the Complainant essentially receiving the procedural benefit of a statute which did not exist at the time the compalint was initiated. It seems clear that if action is taken in a timely fashion, rights accruing from a statutory provision are not lost if the statute is thereafter repealed.

> "14(1) Where an Act is repealed or where a regulation is revoked, the repeal or revocation does not, except as in this Act otherwise provided, ..."
>
> "(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, regulation or thing so repealed or revoked"
>
> ...
>
> "and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be composed as if the Act regulation or thing had not been so repealed or revoked."

[Interpretation Act, R.S.O. 1980 c.219 s.14(1)(a)]

In addition, Section 14(2)(c) of the Interpretation Act provides:

> "14(2) If other provisions are substituted for those so repealed or revoked, ..."
>
> "(c) ... in the enforcement of rights existing or accruing under the Act regulation or thing so repealed or revoked ... the procedure established by the substituted provisions shall be followed so far as it can be adopted [R.S.O. 1980 c.219 s.14(2)(c)."

This Section seems to suggest that matters of practice and procedure, specifically the appointment of this Board and the reconsideration of the complaint are governed by the New Code.

In the result, the Board ruled that the substantive law governing the complaint is that of the old Code while the procedure is that which is set out in the current legislation.

While it is true that this bifurcation afforded the Complainant a benefit which she would not have had under the old Code this does not seem to me completely inconsistent with the generally educative and compensatory function of human rights legislation. In considering the decision of the Commission to reopen the matter I am mindful of the words of another Board of Inquiry:

> "One must assume that at these steps in the statutory process consideration was given to the gravity of the issue and the desirability of such a public expenditure of time and money on its resolution."

[Allan and Wilson v. Riverside Lodge (1985), 6 C.H.R.R. para. 24030].

The Evidence

The following outline of the evidence is the result of a detailed consideration of the transcript from the hearing. The testimony of the witnesses was often confused and contradictory and given the length of time between the initial complaint and the hearings this is entirely understandable. On the whole, the witnesses honestly struggled to recall events which had occurred some four years previously and inherent contradiction and discrepancy in their testimony is to be expected. My conclusions as to the facts which surround the complaint are a distillation of the cumulative record and are, what in my opinion, seem most probable.

As mentioned above, Catherine Prestanski was employed at Windsor Western Hospital during the summers of 1979 and 1980. On both occasions she was employed as vacation relief; in 1979 from August through October [Evidence Vol. I, p.39, 49] and in 1980 from April 23 until September 15th [Evidence Vol. I, p.54, 56]. There is some disagreement as to whether Ms. Prestanski was terminated for a two week period in 1980 from May 26 until June 9, however in my view of the case this is an unimportant detail.

Ms. Prestanski was employed by the Housekeeping Department to do cleaning work such as vacuuming, washing and dusting. There is some evidence that Ms. Prestanski's job performance was not exceptionally good. Her work evaluation after the 1979 discharge did not recommend re-employment. However, she was rehired in 1980 and it appears that this was in some measure due to the lobbying of a family friend, Mrs. Dorothy Desjardins, the then Assistant Director of Housekeeping [Evidence, Vol, IV, p.98]. On May 26, 1980 the Complainant received a good work evaluation and a recommendation for rehire on June 9 of that year. This evaluation surrounds the disputed two week layoff period which the Complainant denies taking. Finally, in September of 1980, at the time of her discharge, Ms. Prestanski received a fair evaluation and a recommendation not to rehire. [See Exhibits #6, #9, #10].

In July of 1980, Ms. Prestanski, apparently realizing the impermanence of her vacation relief status submitted a letter to Personnel applying for a permanent, full-time position in

Housekeeping. This letter was submitted on the Complainant's own initiative and not in response to a job posting. However, in August of 1980, three permanent jobs became available in Housekeeping; two Porters' positions and one Maid's position. These vacancies were posted for a three day period as per the collective agreement. Ms. Prestanski immediately submitted a letter requesting consideration for the Porter's position. She did not specifically apply for the Maid's position since a co-worker was interested and the two did not wish to compete head-to-head. In addition, the Porter's position was more highly-paid. The August 27 job application was given to Marilyn Stoddart. Placement Officer [Evidence Vol. I, p.63, Exhibit #4].

The evidence surrounding hiring procedures at the Hospital and specifically in the Housekeeping Department was somewhat vague. It seems clear that the collective agreement establishes guidelines when bargaining unit employees are involved. However, once outside the bargaining unit there are apparently no rigorously followed hiring procedures. A great deal of evidence was adduced on this point and in my opinion there are three relevant issues to be determined with respect to this complaint:

(1) What type of applicants were there for the posting? (i.e. bargaining unit, temporary, or off the street).

(2) How was this type of applicant pool normally handled?

(3) How was this specific posting handled?

The evidence is clear that there were no bargaining unit applicants for the August 27th posting. Mrs. Stoddart testified that she considered three applications for the two Porters' positions; the specific letter from Ms. Prestanski, a general request for full-time employment dated August 19th from Mr. Pageau and, a general request for full-time employment dated August 29th from Mr. Fryer. [Exhibits #30 and #32] All three applicants were then vacation-relief staff. The evidence suggests that although not unique such an applicant pool did not occur with enough frequency for Personnel to have developed any hiring guidelines. Hiring decisions involving the promotion of temporary staff to full-time within Housekeeping was apparently made by one or both of Jackie McLean and Marilyn Stoddart. A number of usual selection criteria were suggested by the respondent's witnesses; i.e. length of service, job performance and ability. [Evidence Vol. IV, p.23, Vol. V, p.274-75] However, there is no evidence that any specific hiring policy existed.

The evidence of Mr. Lopes, Mrs. McLean and Mrs. Stoddart is that Mrs. Stoddart was solely responsible for the August 27th hiring decision [Evidence Vol. IV, p.3, Vol. V, p.240, Vol. VI, p.27]. Mrs. Stoddart asserts that she made the choice based simply on the 1980 starting dates of the three candidates [Evidence Vol. VI, p.28-45]. She admitted that she could just as easily have made the selection alphabetically or

from a hat but that the date of hire criteria "seemed like a fair basis. I felt they were all equal in skill and ability." [Evidence Vol. VI, p.42]. The respective dates of hire of the three candidates were: Randy Pageau - Hired March 26; Mark Fryer - Hired April 1st; Catherine Prestanski - Hired April 23rd.

The Complainant sought to establish that the hiring decision was in fact made on the basis of sex , a compelling conclusion given the fact that for years Maids were exclusively women and Porters men. Ms. Prestanski alleged that she was told on separate occasions by both Mrs. McLean and Mrs. Stoddart that the Porters' positions were for men only. The discussion with Mrs. McLean took place in the Hospital cafeteria in early September after the hiring decision had been made. According to Ms. Prestanski she approached Mrs. McLean, who was sitting with Mrs. Desjardins, and enquired about the Porters' positions:

> "I asked them about the porter's position and I asked them if I had gotten it and they said no. There was both Dorothy and Jackie talking at the same time so it was kind of hard to say which one really mainly - they said that it's - no women has ever been in that, in the porter's position before. They said that they don't hire women in that position, that it's a man's job and they never will hire women in that position. [Vol. I, p.67]."

This statement is denied by Mrs. McLean.

In total, the evidence of the cafeteria incident is marred with inconsistencies from both parties' witnesses. There is uncertainty as to the time of the conversation, who was present, what was said and how many conversations there in fact were. However, in my view the specifics of the cafeteria

incident are irrelevant to the issue at hand. Even if it can be proven that Mrs. McLean did make discriminatory statements, the evidence is that she was uninvolved in the hiring decision.

Ms. Prestanski also alleges that she was told by Mrs. Stoddart sometime later in September prior to her lay-off that:

> "I wouldn't get the job as a porter because they don't hire women in that department. But maybe in the kitchen."

[Evidence Vol. I, p.72]

Not surprisingly, Mrs. Stoddart denies making this statement although she recalls a meeting with the Complainant in which the possibility of kitchen work was discussed.

> "Well, when Cathy came into the office, it was very casual - I was just chatting with my secretary and she told me that she'd like another porter's position. I said, 'Fine. If something came up, I'd be glad to consider you', and she said like when, and I said, 'Well, I don't know when.' Well, then, where, and I said 'Well, perhaps in the kitchen.'"

[Evidence Vol. VI, p.19-20].

Both witnesses allege that the other is untruthful and the issue is one of credibility for the Board to decide.

This litany of facts would not be complete without a brief reference to the alleged hiring of a woman as a Porter prior to the events which gave rise to this complaint. There is some controversy about this allegation. In its initial decision not to recommend that the Minister appoint a Board of Inquiry, the Commission cited evidence that the Porter's position had not always been exclusively male-dominated. On reconsideration the

Commission found that there was no evidence to support the allegation that a female Porter had previously been hired and this apparently influenced its change of mind. Mrs. Stoddart's testimony helped to clarify this situation. She gave evidence that sometime after 1979 an advertisement was placed with Canada Manpower for a Porter's position in the Housekeeping Department. According to Mrs. Stoddart, a woman applied, was interviewed and offered the position, which she declined. The evidence was tendered to rebut the natural inference that the Porter/Maid jobs were exclusively gender-related. Whether or not it is accepted, it is of little value.

Exhibit 17 in this hearing was six pages of handwritten notes by Anne Carrick, the Human Rights Officer who investigated the complaint. The notes were prepared by her during a meeting with Mr. Lopes, Mrs. Stoddart and Jackie McLean on November 13, 1980. The Commission chose not to call Mrs. Carrick, and, in fact, the notes were not introduced until the cross-examination by Commission counsel of the Respondent's first witness. The notes were relied on to the extent that the witness admitted to making a particular statement at the November meeting. The notes, which were almost illegible, were initialled by Mr. Lopes, Mrs. McLean and Mrs. Stoddart and the Commission argued that this demonstrated their agreement with what was recorded. Although the notes taken, at their best, could be helpful to the Commission's case, this Board takes a dim view of the way in which they were introduced and finds them of little assistance.

The Law

The Commission submits that the Respondent's have violated Sections 4(1)(a)(b)(c)(e) and (g) of the Ontario Human Rights Code R.S.O. 1970 c.318 as amended. The statute reads as follows:

> "4(1) No person shall,
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> (a) refuse to refer or to recruit any person for employment;
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> (b) dismiss or refuse to employ or to continue to employ any person;
>
> (c) refuse to train, promote or transfer an employee;
>
> ...
>
> (e) establish or maintain any employment classification or category that by the description or operation excludes any person from employment or continued employment;
>
> ...
>
> (g) discriminate against an employee with respect to any term or condition of employment, because of the ... sex ... of such person or employee."

Clearly, the basis of the claim is that Ms. Prestanski was refused full-time employment because she was a woman.

As is so often noted, discrimination is easy to allege and difficult to prove. In the words of Professor Lederman, sitting as a Board of Inquiry in Kennedy v. Mohawk College Board of Governors, (1973) pp.4 and 5 (unreported).

> "In a case where direct evidence of discrimination is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is in issue. This is not always an easy task to carry out, the conduct alleged

> to be discriminatory must be carefully analyzed and scrutinized in the context of the situation in which it arises. In my view, such conduct to be discriminatory must be consistent with the allegation of discrimination and inconsistent with any other rational explanation. This, of course places an onus on the person or persons whose conduct is complained of as discriminatory to explain the nature or purpose of such conduct. It should also be added that the Board must view the conduct complained of in an objective manner and not from the subjective viewpoint of the person alleging discrimination."

A finding of discrimination does not depend on proof that the protected ground is the only cause of the alleged discriminatory conduct. Since the decision in R. v. Bushnell Communications Ltd. et al, [1974] 4 O.R. (2d) 288, Boards of Inquiry have recognized that if a prohibited ground is one of the proximate causes of an employment decision, discrimination has occurred. The Court of Appeal found that the question which must be determined is: "What motivated the employer to take the action which he in fact took with respect to the employee?" [at p.290]. The decision suggests that if a prohibited ground is a "cause" or a "ground" for an employment decision then discrimination is made out.

The Commission must establish on the balance of probabilities that a prima facie case of discrimination exists. Once established the onus shifts to the Respondent to rebut the Complainant's case or to otherwise establish a defence. However, even if the respondent leads evidence of a non-discriminatory reason for the hiring decision, the complainant and the Commission can still establish that reason is in fact a pretext and that discrimination on an unlawful ground was an operative

reason for the respondent's actions.

In considering the application of the law to the facts of this case, a number of problems arose. Given the existence of job classifications styled "Maid" and "Porter" it is difficult to resist the conclusion that the hiring of Porters discriminated against women. The fact that Ms. Prestanski was virtually the first woman to apply for a Porter's position and that this seems to have set off shock-waves in the Hospital community is also telling. It is also interesting to note that even during the course of the hearing some unconscious stereotyping occurred. As indicated in the facts, both Mark Fryer and Randy Pageau submitted letters of application for the first full-time position to become available in Housekeeping and not specifically for the Porters' jobs. However, the unquestioned evidence of Mrs. Stoddart was that she had three applications for the Porters' positions, one specific and two general, and only one for the Maid's position. Clearly, Mrs. Stoddart (and counsel at the hearing) unconsciously assumed that men would not be applying for the Maid's position despite the general wording of their applications [Evidence Vol VI, p.30, Exhibits #30 and #32]. However, whatever one's instinctive response to an employment situation is, the fact remains that the Commission's case depends on establishing discrimination in a specific instance, that is in the hiring decision regarding Catherine Prestanski.

In my opinion the Commission has established a <u>prima facie</u> case of discrimination on the basis of sex. In other

words, the Commission's evidence, if true, seems to me sufficient to justify a finding in their favour in the absence of an answer from the Respondents. If the Complainant's version of the discussion in Mrs. Stoddart's office is accurate, there is direct evidence that the Personnel Officer took Ms. Prestanski's sex into consideration when hiring the Porters. In addition, the indirect evidence of the existing job categories and the pattern of differentiation by sex is sufficient to justify an inference of discrimination.

However, in my view, the Hospital has provided an answer which rebuts the Commission's case - that is, that the hiring decision was made on the basis of the dates of hire in 1980. In Offierski v. Peterborough Board of Education (1980), 1 C.H.R.R. para.263 the Board of Inquiry dealt with alleged discrimination in employment on the basis of sex. The decision involved a female teacher who believed she had been by-passed for senior administrative positions because she was a woman. Peter Cumming, Chairman, described what must be proven to establish a prima facie case of discrimination. It is suggested that his requirements are too strigent for a prima facie case, given the decision in Bushnell, and the fact that Boards are willing to find discrimination if a prohibited ground is simply a proximate cause of an employment decision. However, the test as enunciated does provide a realistic format for a respondent to rebut an inference of discrimination. Mr. Cumming wrote that to establish discrimination on the basis of sex a complainant must show:

> "(1) that she was qualified for a position for which she applied.
>
> (2) that despite such qualifications she was rejected and that
>
> (3) subsequent to her rejection the position remained open, or, alternatively that an applicant of the opposite sex of apparently lesser qualifications was chosen for the position."

[(1980), 1 C.H.R.R. para.269]

In my opinion, the Commission has established that Ms. Prestanski was qualified and was rejected. However, the reasons advanced for hiring Mr. Fryer and Mr. Pageau were reasonable and apparently legitimate. I accept Mrs. Stoddart's testimony that, given the basically unskilled nature of the job, the hiring date criteria was a fair basis on which to select applicants and was in fact the criteria used. Even if manifestly unfair, as long as they were not advanced as a pretext any non-discriminatory hiring criteria could be used. In addition, both Mr. Pageau and Mr. Fryer were arguably better qualified for the positions, since they had been performing the exact job as vacation relief.

In order for the Commission's case to prevail I must accept one of two possible scenarios. The first is that Mrs. Stoddart did tell Catherine Prestanski that women were not hired for Porter's positions and that this sentiment was a proximate cause of her hiring decision. Alternatively, I could accept that Jackie McLean in fact filled the Porter vacancies and that her disciminatory attitude is revealed by the alleged cafeteria

conversation. I have no difficulty in concluding that the hiring decision in this case was made by Mrs. Stoddart. The evidence of the cafeteria incident is therefore irrelevant. I also accept Mrs. Stoddart's evidence that her decision was based on the neutral criteria of hiring dates. The Commission's case is simply not convincing enough. Evidence of loosely structured and somewhat disorganized hiring guidelines is not evidence of discrimination. Reduced to the essence, it seems that the Commission's case is simply this: The Porters were male, the Maids were female. Therefore females could not get Porter's positions and therefore Catherine Prestanski was discriminated against. While this logic is appealing at a certain level the reality is that the Code requires proof on the balance of probabilities of discrimination on the basis of sex with respect to the Complainant. Although one can sympathize with Ms. Prestanski's disappointment at failing to secure a full-time job, I find it impossible to conclude that Mrs. Stoddart's hiring decision was not honestly motivated and based on the qualification of the applicants. Ms. Prestanski was not refused the position because of her sex. She was refused because the legitimate hiring criteria utilized by the placement Officer resulted in the choice of two other at least equally well-qualified applicants.

In conclusion, the Board feels compelled to note its discomfort with clearly sexists job labels such as Maid and Porter. It seems likely that the Commission also was concerned

with the apparently gender-related job categories in existence at the Hospital in 1980. To a Human Rights Commission the use of terms such as Maid and Porter must be roughly equivalent to the waving of red flags at a bull. However, the fact remains that Ms. Prestanski's case was an inappropriate vehicle to censure the Hospital's employment practices.

In the result, the complaint is dismissed.

DATED AT London, Ontario
this 7th day of July, 1986.

M. R. Gorsky
Board of Inquiry